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No. 852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

PAN AMERICAN WORLD AIRWAYS, INC., and
THE TRAVELERS INSURANCE COMPANY,

Petitioners,

v.

WILLIAM M. O'KEEFFE, Deputy Commissioner,
United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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WILLIAM M. O'KEEFFE, Deputy Commissioner,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Pan American World Airways and The Travelers Insurance Company petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on October 16, 1964.

Opinions Below.

The opinion of the Court of Appeals is reported in 338 F. 2d 319. It is reproduced in Appendix A. The opinion of the District Court included in its final decree is not reported. It is reproduced in Appendix B. The opinion of the respondent Deputy Commissioner, included in his compensation order, is set out in Appendix C.

Jurisdiction.

The judgment of the Court of Appeals (Appx. A) was entered on October 16, 1964. A petition for rehearing (R. 158) seasonably filed by petitioners on November 4, 1964 was denied December 28, 1964 (Appx. E). The jurisdiction of the Court is invoked under 28 USC 1254 (1).

Question Presented.

The Court of Appeals based its decision on the principles it announced (1) that employment under the Longshoremen's and Harbor Workers' Act, as extended by the Defense Bases Act, in such places as Grand Turk Island in the British West Indies creates in and of itself a zone of special danger linking the injury with the place of employment; because such an island lacks most of the social and recreational facilities available to American employees on the United States mainland, the employee's recreation is in the service of his employer no less than in his own interest; and that the employee in this case being subject to call in off-duty hours and having been injured after his regular day while engaged in recreational or social activities or returning to base, his injury occurred within the scope of his employment, and (2) that the British traffic rule of driving motor vehicles on the lefthand side of the highway "exposed Rose to an unusual danger" (R. 155).

The question presented is whether the Court of Appeals, in reversing the judgment of the District Court, who had enjoined the Deputy Commissioner's compensation award, unduly extended the doctrines of cases by this Court relating to the same subject.

Statutes Involved.

The pertinent provisions of the Longshoremen's and Harbor Workers' Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 USC 901, *et seq.*) and the Defense Bases Act (Act of August 16, 1941, as amended, 56 Stat. 1035, 42 USC 1651, *et seq.*) are set forth in Appendix D.

Statement.

This action was brought in the United States District Court for the Middle District of Florida by the employer (Petitioner Pan American World Airways) and its insurance carrier (Petitioner The Travelers Insurance Company) to set aside and enjoin enforcement of a compensation order, awarding death benefits under the Longshoremen's and Harbor Workers' Act as extended by the Defense Bases Act, to the widow and minor children of George B. Rose, deceased employee (R. 144).

Rose was employed at a defense base on Grand Turk Island by Pan American World Airways, and his employment was subject to the provisions of the Longshoremen's Act. After his regular working hours, on returning to the base from the direction of Cockburntown, about three miles distant, operating and alone occupying a motor scooter which he had obtained without permission from its owner, he met a truck, furnished by the employer for, and occupied by, other employees, on their way to Cockburntown, and though the truck pulled entirely off the pavement and stopped, Rose ran the motor scooter into the truck, receiving injuries from which he died. The time was ten minutes after midnight of September 11, 1959.

The essential facts underlying the Deputy Commissioner's award, the judgment of the District Court and its reversal by the Court of Appeals are as follows:

Rose was employed as a medical and recreational supervisor. His normal hours of duty were from 7:15 A. M. to 4:15 P. M., but in case of emergency he was on call medically twenty-four hours a day. The collision between the motor scooter and the truck occurred about two miles north of and off the base at which Rose was stationed, on the highway which connected the base and Cockburntown. The truck was one of several regularly established and maintained by the employer for carrying employees whose services were performed at the base to or from Cockburntown throughout the night in connection with the duties of their employment. Rose had not planned or intended to take part in any medical treatment or operation during the evening or night of that September 11th, or the morning of the next day, or to perform or engage in any of the duties or functions which attached to his employment. He was last seen at the base in the evening of September 11th while in a group at a place maintained by the employer and used by the employees as a club for recreational purposes. When Rose left the group he was not called off the base on an emergency arising in connection with his duties. No such call was made for him that afternoon or night. No representative of the employer and no other person at the base knew where he was between the time he left the group and the time of his injury, although, as the Court of Appeals noted, "When he left the base he was required to leave word where he could be located" (R. 146).

After leaving the base, Rose was next seen at the home of a Mrs. Smith, about two hundred yards south of Cockburntown on the road connecting it and the base. There is no evidence that Rose was seen in Cockburntown

after leaving the base. He arrived at the Smith home about 9:30, and left it about 10:15, P. M. There is no account of his whereabouts or activities between those hours. There is, therefore, nothing to indicate whether during that time Rose was going about his master's business or doing anything connected with it. The record shows that during that unexplained gap of almost two hours, as well as in the afternoon and evening after 4:45 P. M. Rose could get at all times all the recreation and social intercourse and relaxation at the base as he could anywhere else on the island.

The Court of Appeals (R. 146) said that there was an "inference that Rose's long ingrained habit of righthand driving asserted itself when confronted with an emergency traffic situation". The record does not show that Rose had acquired such a habit and for all that appears he may have been one of those persons who had not driven an automobile in the United States. The case of *Waters* v. *Ray*, Fla. App. 1, 1964, 167 So. 2d 326, 330, has recently observed that "Even in this modern age of whirling wheels there are citizens who do not possess driver's licenses".

There are in the record also no facts to show or facts from which an inference could be drawn that when Rose met the truck he went into an emergency traffic situation.

The Court of Appeals said (R. 146) that Rose was subject to a peculiar hazard resulting from the fact that on the island motor traffic drove on the lefthand side and that such a fact exposed him to an unusual danger which caused his death (R. 155); and stated (R. 146) that on a number of occasions he had driven a jeep but "the evidence suggests that this night was the first time he had been in control of a vehicle on the highway after dark". And the opinion states (R. 156) "the record shows that he had been called on a number of times at night to render emergency first aid". Rose had visited Mrs. Smith "2 or 3 times per week

for approx. 3½ months'' (R. 48), or from June through September, 1959. On these occasions he had been a guest in Mrs. Smith's home. Two visits per week for three and a half months would have totaled about twenty-eight. Three visits per week for fourteen weeks would have totaled forty-two. There is no evidence as to how he traveled in making those visits, but the only fair inference is that he did not walk, hence drove a motor vehicle. Rose got off duty at 4:15 P. M. and the only recorded time of his arrival at Mrs. Smith's was 9:30 P. M. The evidence does not show and the Deputy Commissioner did not hold, and neither suggested that hence it may not be thought unlikely that some others of Rose's trips to Mrs. Smith's home were in the nighttime.

It is not a reasonable inference that a man of Rose's mentality, ability and experience would have been so confused when he met the truck as to have been thereby ''confronted with an emergency traffic situation'', or that the meeting would have ''exposed Rose to an unusual danger''. The Court of Appeals observed (R. 148), ''Rose's job was to organize entertainment on and off the base for the off-duty hours of other employees''. Rose was twenty-eight years old. The medical and recreational duties he was employed to perform and did perform were important ones. He was capable of making, and that day made, a physical examination of a female fellow employee (R. 51) after which he drove her in a truck to the home of the medical officer, from there carried her to the hospital and then returned the truck to the point of its origin (R. 51). Rose was responsible for establishing and maintaining an active health program at the base, for providing first aid treatment as well as accident and disease prevention. He developed and directed the recreational program for the base, the program includ-

ing volley ball, soft ball and station parties; and he was in charge of the moving pictures shown at the base (R. 57). He taught another base employee how to make and insert a temporary tooth filling (R. 97). He planned a party for 173 men and arranged for their entertainment (R. 101). He operated on a painful finger the details of which were "a long and very bloody story" (R. 113, 114). For some time he had treated one patient with an infected thumb and another for an old war injury that was "kicking up" (R. 122). Rose clearly was no dolt or lackwit and had sufficient intelligence and mental versatility to have learned the simple lesson that many an American tourist to Nassau's New Providence Island learns in one day, that if he is to avoid a collision while driving a motor vehicle on the highway he must keep to the lefthand side of the road.

The Court of Appeals pointed out (R. 148) that the Defense Bases Act was adopted at the request of the Secretary of War in order to save the previous heavy expense of providing its (*sic*) contractors with insurance of such employees on the bases of tort liability and full accident insurance; and cited H. Rep. No. 1070, 77 Cong., 1st Sess. (July 29, 1941), pages 4, 7. Senate Report No. 540, dated July 10, 1941 dealing with the same measure said:

> "The design of this measure is to *provide substantially the same relief* for injuries or death of employees at bases leased by the United States from Great Britain or any other country as *existing law affords similar employees in the United States*, and to assist contractors employing labor at such bases in obtaining compensation insurance at reasonable rates". (Italics added.)

If that be true there are very many cases which uphold the Fifth Circuit's *Gondeck* opinion (*United States* v. *Pan American World Airways*, 5 Cir. 1962, 299 F. 2d 74; cert. denied 370 U. S. 918; rehearing denied 371 U. S. 856) and are at odds with its opinion in this case. Among them are *Brown-Pacific-Maxon* v. *Pillsbury*, Calif. D. C., 1953, 132 F. Supp. 421 (cited in *Gondeck*, 299 F. 2d at page 78), and *Hurley* v. *Lowe, Dep. Commissioner*, D. C. Ct. App., 1948, 168 F. 2d 553, both of which are well considered opinions under facts similar to those present here; and the following cases which deal with "substantially the same relief . . . as existing law affords similar employees in the United States": *DeMara* v. *Employers Liability A. Corp.*, 5 Cir. 1958, 250 F. 2d 799; *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128 (1930); *Ayers* v. *Parker*, Md. D. C., 1936, 15 F. Supp. 447; *Didier* v. *Crescent Wharf & Warehouse Co.*, Calif. D. C. 1936, 15 F. Supp. 91; *Turnbull* v. *Cyr*, 9 Cir. 1951, 188 F. 2d 455, 457; *Newport News Shipbuilding & Drydock Co.* v. *O'Hearne*, 4 Cir. 1951, 192 F. 2d 968, 971.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals carries to a new extent the decision of this Court in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504 (1951). If the coverage of the Longshoremen's Act under the Defense Bases Act could be discerned as snugly as the Court of Appeals said in this case, it would seem that *O'Leary* v. *Brown-Pacific-Maxon, Inc.* would hardly have refrained from laying down the simple doctrine announced here by the Fifth Circuit.

2. The decision of the Court of Appeals was by a panel of three Judges. The decision virtually overrules a prior

decision by the Fifth Circuit in *United States* v. *Pan American World Airways, (Gondeck)* 5 Cir. 1962, 299 F. 2d 74; cert. denied, 370 U. S. 918; rehearing denied, 371 U. S. 856. The facts in *Gondeck* were substantially similar to the facts in this case, and *Gondeck* was decided in both the District Court and the Court of Appeals in favor of the employer. *Gondeck* was carefully considered by a District Judge for the Middle District of Florida in the case of *William O'Keeffe, Deputy Commissioner* v. *Smith, Hinchman and Grylls Associates, Inc. and Royal Indemnity Co.*, 222 F. Supp. 4 (1963), along with *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 501; and on his construction of them and of some of the cases relied on by the Court of Appeals in this case, the District Judge upheld the Deputy Commissioner's award. The facts in *Smith-Hinchman* were quite similar to those here. On appeal the Court of Appeals reversed the District Judge, per curiam, on the authority of *Gondeck*, 327 F. 2d 1003 (1964); and the case is pending in this Court as No. 307 of the October Term, 1964, *sub nom. William M. O'Keeffe, Deputy Commissioner, etc.*, Petitioner v. *Smith, Hinchman, Grylls Associates, Inc. and Royal Indemnity Co.* That *per curiam* was rendered by Chief Judge Tuttle and Circuit Judges Jones and Bell. *Gondeck* was decided by Circuit Judges Jones and Bell and by District Judge Simpson (who decided this *Rose* case in the District Court). The opinion we pray to have reviewed is by Judge Wisdom, concurred in by Chief Judge Tuttle and by District Judge McRae. Petitioner here filed a petition for rehearing in the Court of Appeals pointing out the confusion in the Fifth Circuit Court that had resulted from these different conclusions reached on essentially the same facts by varying panels of that Court, and in the petition suggested that the rehearing might well be by the Court of Appeals *en banc*. The petition was denied without comment.

3. There are now pending before this Court applications for certiorari in numbers 307 (*Smith, Hinchman*); and 474 (*Pan American World Airways, Inc. and The Travelers Insurance Company*, Petitioners v. *Stephen O'Hearne, Deputy Commissioner, etc.*, Respondent) in which the Fourth Circuit Court of Appeals (335 F. 2d 70) reached a conclusion contrary to that of the Fifth Circuit in *Gondeck* and in *Smith, Hinchman*. We suggest that it would be helpful to counsel and lower courts if this Court should find it fit to entertain this petition and perhaps dispose of the three cases at one time.

We submit also, as the Solicitor General did on page 11 of his petititon for a writ of certiorari in No. 307:

> "It is important that the existing conflict of decisions be resolved. The significance of the issue is underscored by the far-flung nature of our defense base activities throughout the world and by the further fact that there are several thousands of injury cases reported annually under the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Defense Bases Act".

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Proof of Service.

I, CHARLES COOK HOWELL, one of the attorneys for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of January, 1965, I served copies of the foregoing petition for writ of certiorari on the several parties thereto as follows:

1. By leaving a copy thereof at the office of

   Donald C. Lehman, Esquire
   Assistant United States Attorney
   Federal Building
   Jacksonville, Florida
   Attorney for Respondent;

2. By leaving a copy thereof at the office of

   Respondent William M. O'Keeffe
   Deputy Commissioner
   United States Department of Labor
   Fidelity Federal Building
   411 West Adams Street
   Jacksonville, Florida; and

by mailing copies in duly addressed envelopes with Air Mail postage prepaid to the other parties' respective attorneys of record, as follows:

3. To The Solicitor General
   Department of Justice
   Washington 25, D. C.;

4. To Leavenworth Colby, Esquire
   Chief Admiralty Section
   Department of Justice
   Washington 25, D. C.
   Attorney for Respondent;

5. To Arthur M. Ossinsky, Esquire
Daytona Beach, Florida
Attorney for Claimants.

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APPENDIX A

Opinion.

(R. 143)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20440

WILLIAM M. O'KEEFFE, Deputy Commissioner,
United States Department of Labor,
Appellant,

versus

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

(October 16, 1964.)

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and McRAE, District Judge.

WISDOM, Circuit Judge: This is a "scope-of-employment" case involving an employee on Grand Turk Island in the British West Indies, 700 miles from the mainland. Discussing a similar case, Judge Chambers of the Ninth Circuit has written: "We do not think that the case is to be tested by the conventional mainland case where the truck

driver departs from his authorized route for his private personal convenience." *Self* v. *Hanson,* 9 Cir. 1962, 305 F. 2d 699. We agree with the Ninth Circuit.

The appeal is from a judgment setting aside a compensation order issued by the Deputy Commissioner, Secretary of Labor, under the Defense Bases Act, 42 U. S. C. A. §§1651-1654. The order awarded death benefits to the widow and minor children of George B. Rose, an employee of Pan American World Airways, who was killed in a traffic accident on Grand Turk. On the essential question whether the employee's death arose out of the course of his employment, the district court considered *Gondeck* (*United States* v. *Pan American World Airways, Inc.,* 5 Cir. 1962, 299 F. 2d 74, cert. denied, 370 U. S. 918) controlling. We find *Gondeck* distinguishable. On the record before us, substantial evidence and fair inferences support the Deputy Commissioner's findings and require reinstatement of his order.

Pan American World Airways, Inc. is one of the government cost-plus contractors in the Cape Canaveral missile project. Its Guided Missile Range Division has a series of tracking stations on islands strung out into the South Atlantic. One such station is located on Grand Turk, a small, flat, tropical island in the Caicos Islands Group. Its white population varies from about 30 to 125. There are anywhere from 1,400 to 3,000 natives on the island. In addition to the PAA tracking station on a United States Air Force land strip, there is a tiny United States Navy base, and a small office of British Wireless & Cable, Ltd. Cockburn Town, the island's only settlement, has two streets and the Queen's Highway which runs to the PAA base two miles from the village.

There are few recreational facilities on Grand Turk.[1] At the tracking station, PAA runs the "Conch Club", a

[1] The Commissioner's supplemental "Clarifying Findings" state: "[At the time of his death Rose was] . . . on a journey of recreation for respite from the natural boredom inherent in the unique character and isolated site of employment, its remoteness from available recreation, and its narrow limits of normal pastime,

cocktail lounge and game room. Boating, fishing, and swimming are available during the daytime. For other recreation PAA employees must got to the "Exiles Club" of British Wireless & Cable, Ltd., or to one of the four or five "juke joints" or bars located in native shacks, or to the parish hall of the Anglican Church.

George B. Rose was the "Medical Recreation Supervisor" on the island. His duties required him to organize social and recreational activities for the men on the base and to render assistance to the base medical officer. His nominal duty hours were from 7:15 A.M. to 4:15 P.M. during the week and from 7:15 A.M. to 12:00 Noon on Saturdays, but he was on call at all times. When he left the base he was required to leave word where he could be located and he was often called upon for emergency duties. He received a salary of $440 a month plus a "down range" bonus of 30 per cent.

September 11, 1959, after his regular duty hours, Rose borrowed a friend's motor scooter and made a social visit to the home of the Leroy Smiths near Cockburn Town. On his way back he had gone 200 yards down the highway when his scooter collided with a PAA truck. Rose was killed.

The record shows that as the truck and the scooter approached, the driver of the truck moved his vehicle to the *left* side of the road. Grand Turk is a British possession where the law of the road requires vehicles to drive on the left side of the road. Rose had been on the island

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and that such recreation was a benefit to the employer as an economic factor in industrial relations." The appellee, in its brief, would allow no room for any inference that employees lack or need recreation on Grand Turk: "There is no evidence that there was any 'natural boredom inherent in the unique character and isolated site of employment'; no evidence that Rose needed or was seeking 'respite' from it. The proposed finding that the island was characterized by 'remoteness from available recreation' is contradicted by the fact that Pan American had provided a club for the recreation of its employees; and there is no evidence that the supposed recreation Rose was seeking in the company of Mrs. Smith or in one of the native night clubs in Cockburntown 'was a benefit to the employer as an economic factor in industrial relations'."

for about three months. On a number of occasions he had driven a jeep, but the evidence suggests that this night was the first time he had been in control of a vehicle on the highway after dark. The Commissioner drew the inference that Rose's long ingrained habit of right hand driving asserted itself when confronted with an emergency traffic situation. By veering to the right instead of to the left, he put his scooter onto a collision course. Rose had played cribbage for three hours before leaving the Smiths' home, and every witness testified to his sobriety. The Deputy Commissioner found that at the time of the accident Rose was sober, that he was not in violation of any order or work rule of PAA, and that the proximate cause of the accident was Rose's confusion over the controlling rules of the road.

The Defense Bases Act requires payment of the compensation benefits under the Longshoremen's and Harbor Workers' Compensations Act, 33 U. S. C. A. §§ 901-950 for injury or death of employees sent away from home on overseas missions "irrespective of where the injury or death occurs".[2] In sustaining the claim for compensation in this case, the Deputy Commissioner found:

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[2] 42 U. S. C. A. §1651

"(a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment—

> (4) under a contract entered into with the United States of any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)-(3) of this subdivision, for the purpose of engaging in public work . . .

irrespective of the place where the death or injury occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof."

> "the contract of hire by the above employer and the above decedent employee brought the decedent employee to a zone where he had to seek recreation under exacting and unconventional conditions and the decedent was acting in the course of his employment when the accident occurred and that the conditions of the employment created a zone of special danger out of which the fatal injury arose."

The Defense Bases Act provides workmen's compensation benefits for many employed outside the territorial jurisdiction of the states. It was adopted at the request of the Secretary of War in order to save the previous heavy expense of providing its contractors with insurance of such employees on the basis of tort liability and full accident insurance, H. Rep. No. 1070, 77th Cong., 1st Sess. (July 29, 1941), pp. 4, 7. See generally, *Republic Aviation Corp.* v. *Lowe,* S. D. N. Y. 1946, 69 F. Supp. 472, affirmed 164 F. 2d 18 (2nd Cir., 1947) cert. den. 333 U. S. 845. Congress intended the act to establish the same finality to decisions of deputy commissioners which is established for the Longshoremen's Act. It must be "liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Dikel,* 1953, 346 U. S. 328, 333, S. Ct. , L. Ed. .

Employees working under the Defense Bases Act, far away from their families and friends, in remote places where there are severely limited recreational and social activities, are in different circumstances from employees working at home. Personal activities of a social or recreational nature must be considered as incident to the overseas employment relationship. The employer recognized the problem: Rose's job was to organize entertainment on and off the base for the off-duty hours of other employees. An employee injured on Grand Turk while off-duty but on call is like a seaman injured ashore on fun of his own. Short of wilful misconduct, the seaman is still in the

"service of his ship".[3] Similarly, Rose, off-duty but subject to call, was in the service of his employer.

Whether the Commissioner's determination involves a "question of fact" or a "question of law where Congress intended the administrative agency to have some discretion or leeway in defining and applying the standard", judicial review of administrative determinations of scope of employment is limited by the substantial evidence test.[4] In *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 1951, 340 U. S. 504, 71 S. Ct. 470, 95 L. Ed. 483, the Supreme Court dis-

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[3] Cf. ". . . Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit. Of necessity, during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence. For that reason, among others, his employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in activities required by his employment. In this respect it is a broader liability than that imposed by modern workmen's compensation statutes. Appropriately it covers all injuries and ailments incurred without misconduct on the seaman's part amounting to ground for forfeiture, at least while he is on the ship, 'subject to the call of duty as a seaman, and earning wages as such.'

"* * *

"We think that the principles governing shipboard injuries apply to the facts presented by these cases. To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly." Aguilar *v.* Standard Oil Co., . . ., 318 U. S. 724, 731, 63 S. Ct. 930, . . . L. Ed.

[4] See Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 241 (1955); 4 Davis, Administrative Law, §§28.08, 29.04, 30.05 (1958); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1377 (1953). See also Gilmore & Black, The Law of Admirality, p. 343 §6-47 (1957); 1 Edelman, Maritime Injury and Death 363 (1960); The Supreme Court, 1950 Term, 65 Harv. L. Rev. 107, 163 (1951).

cussed that test as it applies to findings of the Deputy Commissioner in cases under the Defense Bases Act:

> "The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act [was within the scope of the decedent's employment] as a question of 'fact'. Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term 'fact'. Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. *The conclusion contains a combination of the happening and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law'.*
>
> "Both sides concede that the scope of judicial review of such findings of fact is governed by the Administrative Procedure Act. Act of June 11, 1946, 60 Stat. 237, Ch. 324, 5 USA §§1001 et seq. The standard, therefore, is that discussed in Universal Camera Corp. *v.* National Labor Relations Board, 340 U. S. 474, ante, 457, 7_ S. Ct. 456. It is sufficiently described by saying that *the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.*" 340 U. S. at 507-508 (Emphasis added.)

In *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, the injured employee was on Guam, an island far more civilized than Grand Turk. The employee was off-duty, had sought recreation, and was waiting for transportation back to his base from a recreation trip when he dived into dangerous waters, where swimming was prohibited, in order to rescue two employees of another employer. He drowned. The

Deputy Commissioner made a finding of "fact", as the Supreme Court "seemingly went out of its way" to point out,[5] that the death arose out of and in the course of employment. In reinstating the award, set aside by the court below, the Supreme Court held:

> "Workmen's compensation is not confined by common law conceptions of scope of employment, Cardillo *v.* Liberty Mut. Ins. Co., 330 U. S. 469, 481, 91 L. Ed. 1038, 67 S. Ct. 801; Waters *v.* William J. Taylor Co., 218 NY 248, 251, 112 NE 727, 728, LRA 1917A 347. The test of recovery is not a causal relation between the nature of the employment of the injured person and the accident. Thom v. Sinclair (Eng) [1919] AC 127, 142 Ann Cas 1917D 188-HL. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. *All that is required is that the 'obligations or conditions' of employment created the 'zone of special danger' out of which the injury arose.*" *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. at 506 (Emphasis added.)

Guam was also the place of employment in *Self* v. *Hanson*. Mrs. Self was injured while in a parked automobile with a friend at a time and place which the Court described as leading to "some cynicism about the parking". In upholding the Deputy Commissioner's award, the court observed:

> "[T]his is a case where the scope of employment should be construed in favor of the workman. . . . Obviously, recreation was considered a necessity for MK-PK employees in Guam. . . . [In] conclud[ing] that Mrs. Self's injury was one 'arising out of and in the course of employment . . . [we] consider our decision consistent with the liberal purpose of the act."

---

[5] 4 Davis, Administrative Law 134 (1958).

In *Hastorff-Nettles, Inc.* v. *Pillsbury,* 6 Cir. 1953, 203 F. 2d 641, the employee was injured while returning to his base from a Labor Day recreation in Anchorage, Alaska. In upholding the compensation award the court stated:

> "The deputy commissioner undoubtedly had the exclusive and unreviewable right to draw inferences from the unique character and isolated place of the employment in which Vogel was engaged; its remoteness from available recreation and its narrowed limits of normal pastime; the benefit to Vogel and his employer of recreation as an economic factor in industrial relations; the infrequency of an inconvenience to utilize public transportation facilities; * * *. These circumstances and substantial factors, we think, adequately in law justified the Deputy Commissioner in finding as he did on the whole record before him that Vogel's injuries arose out of and in the course of his employment."

In *Pan American* v. *O'Hearne,* 4 Cir. 1964, . . . F. 2d . . . ., the claimants were the widow and children of Robert M. Smith who was killed in the same automobile accident on San Salvador, (Watling) Island in the British West Indies, in which Frank Gondeck was killed. Smith, Gondeck, and two other friends were returning to the PAA base after spending some leisure hours in "Evelyn's", a native pub in the only settlement on San Salvador. The jeep in which they were riding overturned, because of excessive speed or, perhaps, because of a defect in the road. Smith and Gondeck were killed. The Court, reversing the district court, reinstated the Commissioner's award:

> "The Commissioner concluded that the death of Robert M. Smith arose out of and in the course of his employment. Considering the distant place of employment, the sparsity of population and limited area of the island, the Commissioner determined that the group, including the present decedent, were justified in looking for recreation beyond the con-

> fines of their habitat. In the circumstances of his employment-residence, the Commissioner thought, Robert was only 'doing that he [might] reasonably be expected to do.' In short, that his brief exit was 'an incident of the service'. . . . Although some of the factual ascertainments made by the Commissioner may be without full support, we think substantial evidence undergirds his crucial and determinative fact findings. To these he applied correct and apt principles of law. Together they dictate the award."

The *Gondeck* case stands alone, except for a per curiam opinion. In *Gondeck*, the Court noted that the decedent and three others had been sitting around the Reef Club drinking champagne from 4 P. M. to 7:30 P. M., when they took off for town in a jeep which they had been forbidden to use for personal missions. This Court affirmed the district court's order setting aside the Commissioner's award. The Court emphasized, among other things, "nor did [Gondeck] use the means of travel to and from the place of recreation furnished by the employer". In upholding the Commissioner's award to the heirs of Smith, the Fourth Circuit noted:

> "If the evidence adduced [in Gondeck] was of the same factual content as that offered here, we would deferentially disagree with the outcome." *Pan American* v. *O'Hearne,* F. 2d at .

If *Gondeck* is consistent with *O'Leary* v. *Brown-Pacific-Maxon*, we think that its holding should be limited to the fact-situation presented in the record. There is a major difference between *Gondeck* and the case before us in that the hazard resulting from the left-hand driving rule created a special link between the injury and the place of employment. The Commissioner was well within the scope of his authority in making the inferences, first, that this British traffic rule exposed Rose to an unusual danger and second,

that it was the cause of Rose's death. "If supported by evidence, and not inconsistent with the law, the Deputy Commissioner's inference is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable. . . ." *Cardello* v. *Liberty Mutual Ins. Co.*, 1947, 333 U. S. 469, 477, 67 S. Ct. 801, 91 L. Ed. 1028.

There are other distinctions between the cases. In *Gondeck* the Court noted that the record did not support the Commissioner's finding that the employee was subject to call after his regular duty hours. Here the record shows clearly that Rose was subject to call at all times, without regard to his convenience or to regular working hours. And the record shows that he had been called on a number of times at night to render emergency first-aid. In addition, Rose was not guilty of having violated any company rule at the time of injury; Gondeck's violation cost him his life.

Since for the foregoing reasons *Gondeck* does not control this case, we base our decision on the principle that employment in such places as Grand Turk Island creates a zone of special danger linking the injury with the place of employment. On such an Island, lacking in most of the social and recreational facilities usually available to American employees, the individual's recreation is in the service of his employer no less than in his own interest. If an employee subject to call in off-duty hours is injured after his regular day while engaged in recreational or social activities or returning to base, the injury may properly be held to have occurred within the scope of his employment. We hold that the Deputy Commissioner properly applied these principles to the facts in this case in finding that Rose's death arose out of and in the course of his employment.

We REVERSE and REMAND with instructions that the Deputy Commissioner's order of award be reinstated.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 20440

D. C. DOCKET No. 4732—CIVIL

WILLIAM M. O'KEEFFE, Deputy Commissioner,
United States Department of Labor,
Appellant,

versus

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and McRAE, District Judge.

Judgment.

(R. 157)

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is remanded to the said District Court with instructions that the Deputy Commissioner's order of award be reinstated in accordance with the opinion of this Court.

October 16, 1964

Issued as Mandate:

APPENDIX B

[TITLE OF COURT AND CAUSE OMITTED]

Final Decree.

(R. 128)

[Filed December 28, 1962]

Upon argument by counsel, after due notice, and consideration by the Court, of the matters adjudicated by this decree, it is

ORDERED and ADJUDGED:

1. Consideration of defendant's motion for summary judgment (filed to-wit, October 20, 1961) was deferred by this Court's order of October 20, 1961 pending decision by the United States Court of Appeals for the Fifth Circuit in the case of United States of America and Jeanette E. Gondeck *v.* Pan American World Airways, Inc. and The Travelers Insurance Company. That case was decided February 9, 1962, 299 F. 2d 74; rehearing denied March 7, 1962; certiorari denied by the Supreme Court June 11, 1962, 30 U. S. L. Week 3384; petition for rehearing denied October 8, 1962, 31 U. S. L. Week 3119. The determinative facts in Gondeck are essentially similar to the facts in this case, and Gondeck states authoritatively the law which governs this case. Defendant's motion for summary judgment is now denied.

[245]* 2. Plaintiff's motion for summary judgment (filed to-wit, October 18, 1961) is granted. The matters and things appearing on file and of record in this case show that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law.

3. The defendant William M. O'Keeffe, as Deputy Commissioner, Sixth Compensation District of the United States Department of Labor, and the claimants, Virginia

Littleton Rose, Karen Rae Churchill, Barbara Lantz Varney, individually and as mother and natural guardian of William Carpenter Rose, and William Carpenter Rose, are, and each of them hereby is, permanently enjoined from enforcing, or attempting by any means to enforce the order and award of the defendant Deputy Commissioner dated June 20, 1961 in the matter of George B. Rose, deceased (Case No. DBC-773-444-F before the Commissioner); and said order and award are hereby vacated and set aside.

4. Defendant's oral motion, made at the final hearing of this case, for its remand to the Deputy Commissioner for further findings of fact and/or taking of testimony, is denied.

5. The injunction bond herein filed, dated October 20, 1960, wherein Pan American World Airways, Inc. and The Travelers Insurance Company, a corporation, are principals and St. Paul Fire and Marine Insurance Company, a corporation, is surety, is hereby cancelled and the obligors on it are discharged from all liability under it.

DONE AND ORDERED at Jacksonville, Florida, this 28th day of December, 1962.

s/ BRYAN SIMPSON
United States District Judge

APPENDIX C

Opinion of Deputy Commissioner.

(R. 12)

UNITED STATES DEPARTMENT OF LABOR,

BUREAU OF EMPLOYEES' COMPENSATION,
SIXTH COMPENSATION DISTRICT.

In the matter of the claim for compensation under the Defense Bases Compensation Act (Public Law No. 208-77th Congress as amended)

(GEORGE B. ROSE, deceased), Mrs. VIRGINIA LITTLETON ROSE, Widow, and KAREN RAE CHURCHILL, Surviving child, and BARBARA LANTZ, Mother and natural guardian of WILLIAM CARPENTER ROSE, Surviving child, Claimants,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED, Employer,

THE TRAVELERS INSURANCE COMPANY, Insurance-Carrier.

Compensation Order
Award of
Compensation
Death Benefits for
Minor Children.

Case No.
DBC-773-444-F.

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in accordance with law, the Deputy Commissioner makes the following

FINDINGS OF FACT.

That on the 12th day of September, 1959, the decedent employee above named was in the employ of the employer

above named, a contractor with the United States at Grand Turk Island in the Caicos Islands Group, in the Caribbean Compensation District, established under the provisions of the Defense Bases Compensation Act, (Public Law 208-77th Congress as amended), and that the liability of the employer for compensation under the said Act was insured by Travelers Insurance Company; that the case was transferred to the Sixth Compensatio District in accordance with Section 19(g) of the said ct and with the approval of the Bureau of Employees' Compensation; that on the said day the decedent employee had finished his work for the day except that he was on call 24 hours a day in the event of an emergency, the decedent employee proceeded on a personal errand to another part of the island and used a privately owned motor scooter for his transportation; that at the conclusion of the personal errand the decedent employee proceeded south on Queens Highway back toward the Base at ten minutes after midnight and while going in this direction a truck owned by the employer and driven by an employee of the above named employer was traveling north on the same road to Cockburn town, and as the two vehicles approached at one another the truck driver turned the truck sharply to the left and off the road to avoid a collision with the decedent employee which is a correct traffic maneuver under British Commonwealth traffic regulations and that the decedent turned the motor scooter sharply to the right which is a correct traffic maneuver under traffic regulations of the United States but which was contraindicated under British traffic regulations; that the truck stopped and the decedent employee struck the stopped truck and was thrown to the highway which resulted in the decedent employee sustaining multiple fractures, internal injuries and his ultimate death on September 13, 1959; that the contract of hire by the above employer and the above decedent employee brought the decedent employee to a zone where he had to seek recreation under exacting and unconventional conditions and the decedent was acting in the course of his employment when the accident occurred and that the conditions of employment created a zone of

special danger out of which the fatal injury arose; that the decedent employee was paid in full for the day of the accident; that the employer furnished the decedent employee with medical treatment, etc., in accordance with Section 7(a) of the said Act; that at the time of the fatal injury the decedent employee's average weekly wage amounted to more than $81.00; that the claimant, Virginia Littleton Rose, who was born on November 30, 1924 and married to the decedent employee on January 15, 1955, is the surviving widow of the decedent employee herein and is entitled to death benefits for herself at $28.35 per week (35% of the maximum average weekly wage of $81.00); that Karen Rae Churchill, who was born on January 6, 1949, is the surviving child in relation to whom the decedent employee stood in loco parentis for a period of more than one year prior to his death, and that Virginia Littleton Rose, mother and natural guardian of the child is entitled to death benefits for the support of the said child at $12.15 per week, (15% of the maximum average weekly wage of $81.00); that William Carpenter Rose, who was born on December 14, 1951, is the surviving child of the decedent employee, and that Barbara L. Lantz, mother and natural guardian of the child, is entitled to benefits for the support of the said child at $12.15 per week (15% of the maximum average weekly wage of $81.00); that the employer paid more than $400.00 funeral expenses directly to funeral director, Ehret, Incorporated; that accrued death benefits to which Virginia Littleton Rose is entitled for herself and for the support of the child, Karen Rae Churchill, from September 13, 1959 to April 6, 1961, inclusive (81⅞th weeks at $28.35 per week plus 81⅞th weeks at $12.15 per week), amount to $3,309.43; that accrued death benefits to which Barbara L. Lantz is entitled for the support of the child, William Carpenter Rose, from September 13, 1959 to April 6, 1961, inclusive, (81⅞th weeks at $12.15 per week), amounts to $992.83; that the employer and the insurance carrier have paid nothing to any of the three claimants as compensation; that the services and expenses of Arthur M. Ossinsky, attorney for Virginia Littleton Rose and Karen Rae Churchill, were

necessary services and expenses and the value of such is $450.00.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD

That the employer, Pan American World Airways, Incorporated, and the insurance carrier, Travelers Insurance Company, shall pay to the claimant Virginia Littleton Rose, surviving wife of the decedent employee herein, death benefits as follows:

81 5/7th weeks at $40.50 per week for herself and for the support of Karen Rae Churchill, surviving child in relation to whom the decedent employee stood in loco parentis for a period of more than one year prior to his death, from September 13, 1959 to April 6, 1961, inclusive, in the amount of $3,309.43, which the employer and the insurance carrier are DIRECTED to pay in one sum, less attorney's fee hereinafter fixed, and to continue payments thereafter in bi-weekly installments at $40.50 per week to Virginia Littleton Rose, surviving wife of the decedent employee, as death benefits for herself and for the support of Karen Rae Churchill, the surviving child in relation to whom the decedent employee stood in loco parentis for a period of more than one year prior to his death, subject to the limitations of the said Act or until otherwise ordered.

A fee in the sum of $450.00 is approved in favor of Arthur M. Ossinsky, 224½ South Beach Street, Daytona Beach, Florida, for legal services rendered the claimants, Virginia Littleton Rose and Karen Rae Churchill, same to be a lien upon and deducted from this award.

The above employer and the above insurance carrier shall also pay to Barbara Lantz, mother and natural guardian of William Carpenter Rose death benefits as follows:

81 5/7th weeks at $12.15 per week, for the support of William Carpenter Rose, surviving child of the decedent

employee, from September 13, 1959 to April 6, 1961, inclusive, in the amount of $992.83, which the employer and the insurance carrier are DIRECTED to pay in one sum and to continue payments thereafter in bi-weekly installments at $12.15 per week for the support of William Carpenter Rose, surviving child of the decedent employee, subject to the limitations of the said Act or until otherwise ordered.

Given under my hand at Jacksonville, Florida, this 20th day of June, 1961.

(Signed) WILLIAM M. O'KEEFFE,
William M. O'Keeffe, Deputy Commissioner,
Sixth Compensation District.

APPENDIX D

Pertinent Provisions of the Longshoremen's and Harbor Workers' Act and Defense Bases Act.

1. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*) provides in part:

SEC. 2. DEFINITIONS.—When used in this Act—

* * * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * * *

SEC. 3. COVERAGE.—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * * *

SEC. 19. PROCEDURE IN RESPECT OF CLAIMS.—(a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full

power and authority to hear and determine all questions in respect of such claim.

* * * * * *

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). * * *

2. The Defense Bases Act (Act of August 16, 1941, as amended, 56 Stat. 1035, 42 U.S.C. 1651 *et seq.*) provides in part:

* * * * * *

That (a) except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Com-

pensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment——

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

(3) upon any public work in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone), if such employee is engaged in employment at such place under the contract of a contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) with the United States; but nothing in this paragraph shall be construed to apply to any employee of such a contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

* * * * * *

irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

APPENDIX E.

Order Denying Rehearing.

(613)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 20440

WILLIAM M. O'KEEFFE, Deputy Commissioner, United States Department of Labor,
Appellant,

v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

On Petition For Rehearing.

(Dec. 28, 1964)

(R. unnumbered page between pp. 167 and 169)

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and McRAE, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 852

PAN AMERICAN WORLD AIRWAYS, INC., AND THE TRAVELERS INSURANCE CO., PETITIONERS

v.

WILLIAM M. O'KEEFFE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE DEPUTY COMMISSIONER

The court below, on October 16, 1964, affirmed the deputy commissioner's finding that the death of a defense base employee, while he was engaged in recreational activity, arose out of and in the course of his employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*), as extended by the Defense Bases Act (56 Stat. 1035, as amended, 42 U.S.C. 1651, *et seq.*). Subsequently, in our supplemental memorandum in No. 307 (*O'Keeffe*

v. *Smith, Hinchman & Gryllis Associates, Inc.*) and No. 474 (*Pan American World Airways, Inc.* v. *O'Hearne*), we stated to this Court:

> On October 21, 1964, we advised the Court, by letter, as follows:
>
> > In No. 307, the government has filed a petition alleging a conflict between the decision of the Fifth Circuit in that case and decisions of the Fourth and Ninth Circuits. In No. 474, petitioner Pan American seeks review of a Fourth Circuit decision relying upon the same conflict to which the government refers in No. 307. The government has expressed its acquiescence to a grant of the writ in No. 474.
> >
> > We have just received a copy of an opinion of the Fifth Circuit in a third case, *O'Keeffe* v. *Pan American World Airways*, C.A. 5, No. 20440, October 16, 1964 (copy attached). It appears from a preliminary examination that this latest opinion represents a modification of the Fifth Circuit's earlier views with respect to the issues involved. The opinion, however, is that of a panel of the court and we are not yet advised whether the losing party (Pan American) will seek a rehearing *en banc*.
> >
> > This letter is written to inform the Court of the recent development noted above—one which might affect its disposition of the two pending petitions—and to suggest that it would be appropriate to withhold action upon the petitions for a period of two weeks in order to afford all parties concerned an opportunity to submit their views by supplementary memoranda.

> We are now informed that counsel for Pan American will file a petition for rehearing *en banc* in case No. 20440. If this petition should be granted, the Fifth Circuit will be in a position to express itself definitively upon the issue which has led to a claim of conflict in the two cases pending before this Court. We accordingly suggest that it would be appropriate for this Court to hold the petitions in Nos. 307 and 474 pending the court of appeals' disposition of the petition for rehearing *en banc* to be filed in No. 20440.

The Fifth Circuit, on December 28, 1964, denied the petition for rehearing in No. 20440, the instant case (Pet. App. E-1). Accordingly, there remains unresolved the issue which has led to the asserted conflict in Nos. 307 and 474. In addition, there is apparently a difference of views within the Fifth Circuit. Although we believe that the decision below is correct, we agree with petitioner, for the reasons elaborated in our petition in No. 307, that the question should be definitively resolved by this Court. We accordingly acquiesce in a grant of the petition for a writ of certiorari in the present case.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

February 1965

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